90-3140

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1990

SUZANNE BRUNAZZI GRANT,
Petitioner

v.

FEDERAL LAND BANK OF JACKSON, ET AL,
Respondents

ON PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Louisiana Second Circuit Court of Appeal erred in applying without any precedent the common law doctrine of D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), to the receiver for the failed Federal Land Bank of Jackson. The judgment of the Second Circuit was subject to discretionary review by the Supreme Court of Louisiana, which denied its discretionary review.

The Second Circuit erred in applying the common law D'Oench doctrine to the Farm Credit System, 12 U.S.C. §2001 et seq., when Congress specifically adopted the doctrine for the newly-created Farm Credit System Insurance Corporation, 12 U.S.C. §2277a, but expressly delayed the doctrine's effective date until 1993. See

12 U.S.C. §2277a-10(d) and 10(f). By erroneously extending the D'Oench doctrine to the receiver, the Second Circuit has misconstrued the Farm Credit System presently in effect, deprived the petitioner of substantial rights under the Farm Credit Act, and set out a potentially devastating precedent for the countless farmers now attempting to work out distressed Farm Credit System loans. The petitioner and her co-borrowers have been denied their own claims against the receiver as the successor to the failed Federal Land Bank of Jackson and have lost their valid defenses to the receiver's foreclosure and deficiency actions.

LIST OF ALL PARTIES

SUZANNE BRUNAZZI GRANT

THOMAS A. GRANT, III

JAMES C. STEELE, III

REW ENTERPRISES, INC., AS RECEIVER FOR THE FEDERAL LAND BANK OF JACKSON (FORMERLY THE FEDERAL LAND BANK OF NEW ORLEANS) AND FOR THE FEDERAL LAND BANK ASSOCIATION OF JACKSON (FORMERLY THE FEDERAL LAND BANK ASSOCIATION OF MONROE, LOUISIANA)

WILLIAM CRAWFORD

BURNS WRIGHT

LAWLESS IVY

D. REX PARKER

FARM CREDIT BANK OF TEXAS (AS SUCCESSOR TO REW ENTERPRISES, INC.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents

ON PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

Suzanne Brunazzi Grant, Petitioner, hereby petitions this Court to issue a Writ of Certioriari to review the judgment of the Louisiana Second Circuit Court of Appeal entered April 4, 1990, in the

proceeding entitled "T.A. Grant, III, et al v. Federal Land Bank of Jackson, et al," No. 21,648-CW of the docket of that court from which petitioner sought discretionary review by the Louisiana Supreme Court and which denied the Writ of Certiorari and/or Review on May 25, 1990.

OPINIONS BELOW

State District Court Judge E. Joseph Bleich denial of REW Enterprises, Inc.'s motion for summary judgment, with the reasons set forth in his opinion rendered August 7, 1989, is reprinted as Appendix A. The opinion rendered by the Court of Appeal for the Second Circuit of the State of Louisiana rendered on April 4, 1990, is reproduced as Appendix B; the Supreme Court of the State of Louisiana's order denying petitioner's Writ of Certiorari and/or

Review to the Court of Appeal, Second Circuit, is reproduced as Appendix C.

JURISDICTIONAL GROUNDS

Jurisdiction over the state district court's denial of REW Enterprises, Inc.'s Motion for Summary Judgment invoked the supervisory jurisdiction of the Second Circuit Court of Appeal over the Third Judicial District Court under Article 5, Section 10, of the Louisiana Constitution of 1974, and under Article 2201 of the Louisiana Code of Civil Procedure. The jurisdiction in the Supreme Court of the State of Louisiana was based on the Louisiana Constitution, Article 5, article 2166 of the Louisiana Code of Civil Procedure, and on Rule 10 of the Rules of the Supreme Court of Louisiana. This Court has jurisdiction pursuant to 28 U.S.C. §1257 and pursuant to Supreme Court Rule

10. The state court misconstrued the Farm Credit Act, 12 U.S.C. §2201 et seq., and the Second Circuit's construction was material to its result, see Illinois C.R. Co. v. Messina, 240 U.S. 395, 36 S.Ct. 368, 60 L.Ed. 709 (1916), and the state court decided an important question of federal law--the D'Oench doctrine's applicability to the Farm Credit System--which has not been decided by this Court, but which should be.

This Petition for Writ of Certiorari seeks to review the judgment of the Second Circuit Court of Appeal, which was subject to discretionary review by the Supreme Court of the State of Louisiana and which denied the Writ for Certiorari and/or Review on May 25, 1990; review in this Court is timely pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

12 U.S.C. §2001

12 U.S.C. §2183(b)(1971)

12 U.S.C. §2277a(5)

12 U.S.C. §2277a-1

12 U.S.C. §2277a-5

12 U.S.C. §2277a-10(d)

12 U.S.C. §2277a-10(f)

(These statutory provisions are reproduced in Appendix D.)

STATEMENT OF THE CASE, COURSE OF THE PROCEEDINGS, AND STATEMENT OF FACTS

On July 12, 1983, Suzanne B. Grant,[1] Thomas A. Grant, III, and James C. Steele borrowed $15,000,000 from the Federal Land

[1]Suzanne B. Grant and Thomas A. Grant, III, were married when the loans occurred. They have since divorced and each remarried. For convenience in this brief, Suzanne B. Grant will continue to be referred to as Mrs. Grant.

Bank of New Orleans,[2] with an interest rate of 11.50% per annum with principal and interest due in twenty annual installments. The money was borrowed to help fund the purchase of approximately 36,000 acres of land, primarily in Ouachita and Morehouse parishes in Louisiana. The "Land Bank" portion of the land contained timber; the borrowers and the Land Bank officers and Association understood the timber would be forested to fund the installment payments. To secure the loan, the borrowers pledged approximately 16,000 acres and 150,000 shares of Federal Land Bank Association stock.

[2]The Federal Land Bank of New Orleans succeeded into the Federal Land Bank of Jackson by which name it will be referred in this Petition.

In July 1985, the borrowers obtained a loan from the Ouachita National Bank in Monroe for $1,500,000 to service the Land Bank loan. A collateral mortgage was given to ONB for this loan. It has since been satisfied, and does not concern this writ.

In any event, the borrowers were unable to pay the January 1986 loan installment. The reasons for the borrowers' inability to service the loan are hotly contested and lie at the basis of this case. The borrowers allege, inter alia, that the Land Bank improperly refused to release the timber which in turn frustrated the borrowers from repaying the debt. Without the proceeds of the timber, appraised at one point as worth approximately $3,000,000 more than the debt, the borrowers could not pay the installments and defaulted.

In 1986, the borrowers filed suit against the Federal Land Bank, the Federal Land Bank Association of Monroe, and several officers and directors. The borrowers alleged as mentioned above that the Land Bank had breached its agreement to release timber and gravel from the mortgage so they could be sold and the proceeds used to reduce the debt. Further, the borrowers sought damages and release of other collateral so it could be sold to service the debt. The Land Bank and the other defendants removed the case to federal court. The borrowers sought and obtained a remand. The Land Bank thereafter filed an answer, denying any wrongdoing, and a reconventional demand, seeking to collect on the notes and foreclose on the property.

On May 20, 1988, the Farm Credit Administration placed the Land Bank into receivership according to 12 U.S.C. §2183(b). REW Enterprises, Inc. ("REW"), a Dallas corporation, was named receiver and substituted itself as the party defendant. Thereafter, REW removed the case to federal court. For the reasons more fully discussed later, the district judge granted the borrowers' motion to remand.

Thereafter, REW filed a motion for summary judgment arguing, inter alia, that the D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447, 625 S.Ct. 676 (1942), doctrine barred the borrowers' affirmative claims as well as their defenses to the

foreclosure.[3] After reviewing both side's briefs and argument, the district court judge denied REW's motion. See Appendix A.

REW sought and obtained a supervisory writ from the Second Circuit. Without citing any authority extending the D'Oench doctrine to shield the REW, the Second Circuit reversed the district judge and remanded with instructions to enter summary judgment, reject the borrowers' claims and defenses, and grant REW's reconventional demand. The Second Circuit mailed its opinion on April 4, 1990. The Supreme Court of the State of Louisiana had jurisdiction pursuant to LSA--C.C.P. Art.

[3]There were other issues asserted by REW, but it is the pivotal issue of the D'Oench doctrine that is germane to this writ Petition.

2166 and Rule 10 to exercise discretion to review the Second Circuit's opinion. The Supreme Court of the State of Louisiana denied the Petitioner's Application for Writ of Certiorari and/or Review on May 25, 1990, and this Petition followed.

The upshot of the Second Circuit's holding is that the farmer borrowers will be held liable on notes[4] before any court has considered the merits of their claims and defenses. Before such a harsh result occurs, this Court should examine closely the underpinnings of D'Oench, the purposes of the Farm Credit System, and Congress' express extension of the D'Oench doctrine

[4]Although requested, the borrowers were never able to obtain from REW the balance allegedly due on the notes. Not until the Louisiana Supreme Court denied Certiorari, did the receiver submit the figure of $24,031,352.04 as the amount owed under the mortgages, including interest.

to the Farm Credit system,[5] but not making the doctrine effective until 1993. See 12 U.S.C. §2211a-10(d) and (f).

REASONS FOR GRANTING THE WRIT

1) The D'Oench, Duhme doctrine does not apply to REW. The Federal common-law doctrine of D'Oench, Duhme does not extend to the Farm Credit Administration, to any of the named defendants, nor to REW.

A. THE D'OENCH DOCTRINE.

The Supreme Court held in D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corp., 315 U.S. 447, 62 S.Ct. 767 (1942), that secret agreements designed to deceive creditors or the public authority could not be asserted as a defense against

[5]The policy of congress in enacting the Farm Credit System is to "improv[e] the income and well-being of American farmers and ranchers...." 12 U.S.C. §2001.

the FDIC suing in its corporate capacity to collect a note. The case law has extended D'Oench to the FDIC when it acquires a failed bank's assets. See Federal Deposit Ins. Corp. v. Wood, 758 F.2d 156 (6th Cir.), cert. denied, 474 U.S. 944, 106 S.Ct. 308 (1985). Congress codified D'Oench for the FDIC acting in its corporate capacity. 12 U.S.C. §1823(e). The D'Oench doctrine was later extended by the Fifth Circuit to the FSLIC because the FSLIC does for savings and loans what the FDIC does for banks. Federal Sav. and Loan Lns. Corp. v. Murray, 853 F.2d 1251, 1254 (5th Cir. 1988).

The facts of D'Oench are these. The FDIC sued D'Oench, Duhme & Co., a St. Louis securities firm, on a $5,000 demand note executed by D'Oench, Duhme in 1933, and payable to the Belleville Bank & Trust

Company. The FDIC had insured that bank and acquired the note in 1938 as part of collateral securing a $1,000,000 loan to the bank, made in connection with the assumption of the bank's deposits by another bank.

D'Oench, Duhme had originally sold to the bank and later defaulted on certain bonds. The bank had accepted certain notes to enable the bank to carry the notes and not show any past due bonds. Bond proceeds were to be credited on the notes. The receipts for the notes said, "This note is given with the understanding it will not be called for payment. All interest payments are to be repaid." Id., 315 U.S. at 454, 62 S. Ct. at 678. The FDIC had no knowledge of these receipts. Naturally, in 1938, D'Oench, Duhme raised this defense to the FDIC's collection efforts.

The Supreme Court ruled in the FDIC's favor. In so doing, Justice Douglas noted that the Federal Reserve Act and the Court's holding revealed "...a federal policy to protect [FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [FDIC] insures or to which it makes loans." Id., 315 U.S. at 457, 62 S.Ct. at 679. (Emphasis added). Noteworthy, and as discussed more fully below, REW neither insured any land bank, nor did it make loans to any land bank. The REW is not part of the Farm Credit System Insurance Corporation (FCSIC) Congress created to

insure farm banks in the future. See, 12 U.S.C. §2277a-1-10.[6]

B. COURTS HAVE NOT EXTENDED THE D'OENCH DOCTRINE TO THE FEDERAL LAND BANK OR ITS PRIVATE RECEIVER, REW.

The thrust of REW's argument is that D'Oench, codified by Congress as to the Federal Deposit Insurance Corporation (FDIC) in 12 U.S.C. Section 1823(e) applies and so bars the borrowers' claims and defenses. In reaching this conclusion, neither the Second Circuit nor the REW were able to cite a single decision extending the D'Oench doctrine to the Farm Credit Administration or the federal land bank system.[7] In fact, both the history and

[6] The full effective date for the new corporation is not until January 1993. 12 U.S.C. §2277 a-10(f).

[7] Throughout its opinion, the Second Circuit refers to the Land Bank as a "national" bank. This is wrong. Only those banks organized pursuant to 12 U.S.C.

purpose of the Farm Credit System and the recent Congressional enactment of the Farm Credit System Insurance Corporation (FSLIC), 12 U.S.C. §2277a-2277a-14, bely REW's and the Second Circuit's conclusion.

The purpose of Congress in establishing the original Farm Credit System is set forth in 12 U.S.C. §2001 (a) and (b) (1971):

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free national and

(Footnote 7 continued)
§21 et seq., and authorized by the Comptroller of Currency to commence banking, 12 U.S.C. §26 and §27, are "national" banks. Not every "bank" is a "national" bank. Compare state banks: 12 U.S.C. §214 et seq. And clearly the Land Bank is not a "national" bank under the regulatory scheme. See 12 U.S.C. §21 (formation of national banking associations) and 12 U.S.C. §2012 (In fact, Land Banks deposit their securities and current funds with member banks of the Federal Reserve System or with insured state banks. 12 U.S.C. §2012(14).)

> recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.
>
> It is the objective of this Act to continue to encourage farmer- and rancher- borrowers participation in the management, control, and ownership of a permanent system of credit for agriculture which will be responsive to the credit needs of all types of agricultural producers having a basis for credit, and to modernize and improve the authorizations and means for furnishing such credit and credit for housing in rural areas made available through the institutions constituting the Farm Credit System as herein provided.

Thus, the Farm Credit System merely establishes a mechanism making available

alternative forms of credit to farmers and ranchers. See Aberdeen Production Credit Association v. Jarrett Ranches, Inc., 638 F.Supp. 534, 537 (D.S.D. 1986). And, further, as Congress instructed, the farm credit institutions are to act to give the greatest benefit to the borrowers. 12 U.S.C. §2001(c). REW is not an insurer of deposits as is the FDIC, 12 U.S.C. §1811, or the FSLIC, 12 U.S.C. §1725(a). (Compare the change to the FCA enacted in the FCSIC, 12 U.S.C. §2277a-1, but not effective fully until 1993. 12 U.S.C. §2277a-10(f).) It is this fundamental distinction which requires reversal of the Second Circuit's opinion that D'Oench applies.

Congress itself eliminated REW's argument that it is akin to the FSLIC or the FDIC or that the D'Oench doctrine applies here. Recall that Congress adopted

the D'Oench doctrine when enacting 12 U.S.C. §1823(e). See FSLIC v. Murray, 853 F.2d 1251, 1254 (5th Cir. 1988) (Courts have extended D'Oench to the FSLIC because the FSLIC does for savings and loans what the FDIC does for banks, insure depositors). Compare 12 U.S.C. §1823(c)(2)(A) with 12 U.S.C. §1729(f)(2)(A); not until January 6, 1993, will the newly-created FCSIC exercise the role of insurer of obligations.) REW does not have this function, 12 U.S.C. §2183(b), and Judge Donald Walter of the Western District so noted when he remanded the action in August 1988. Said Judge Walter,

> REW attempts to liken its position to the Federal Deposit Insurance ("FDIC") or to the Federal Savings and Loan Insurance Corporation ("FSLIC"). However, REW is not the to-be created Federal Credit System Insurance Corporation ("FCSIC") which, as REW notes, does not

> become operational until January 6, 1993. Moreover, the regulatory scheme that Congress has created for the new FCSIC is not identical to the schemes for the FDIC or for the FSLIC. REW has not pointed out where Congress has created for the FCSIC the administrative remedies that parties having claims against the FSLIC or FDIC must first exhaust.

In denying federal jurisdiction, Judge Walter rejected the idea that REW resembles the FDIC or the FSLIC. And in fact, it does not.

One interesting case that further undermines REW's argument is Jacobson v. Western Montana PCA, 643 F.Supp. 391 (D.Wyo. 1986). The plaintiff-borrowers had entered into a loan agreement related to a hedging scheme with the Western Montana Production Credit Association. ("PCA"). When the plaintiffs lost substantial sums of money, they sued PCA and others. Pursuant to 12 U.S.C. §2183(b), the Farm

Credit Administration placed the PCA into receivership which contended that the plaintiffs no longer had standing to bring their action. On rejecting PCA's argument, Judge Russell E. Smith wrote,

> Under 12 U.S.C. §2183(b), the Farm Credit Administration is given power to provide for the liquidation of Production Credit Associations. The Act does not expressly empower the Farm Credit Administration to abate existing lawsuits. Acting under 12 C.F.R. §611.1130 (1985), the Federal Land Bank of Spokane made a liquidation plan for the PCA. That plan contained no language abating existing lawsuits or giving the receiver appointed under it power to abate them. Had Congress placed in the Farm Credit Administration some power to require a bankruptcy type liquidation of claims against a Production Credit Association in receivership, a serious problem might arise as to whether Congress could constitutionally so alter creditors' rights. See Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). But certainly, when Congress itself did not abate lawsuits against a Production

> Credit Association in liquidation, and when the Farm Credit Administration by its plan of liquidation did not provide such abatement, a court should not abate them.

Id., 393; see also Federal Land Bank of Spokane v. Stiles, 700 F.Supp. 1060, 1067 (D.Mont. 1988).

The rationale espoused in Jacobson and Stiles applies here too. Where the Farm Credit System did not adopt D'Oench and where Congress has adopted it, but expressly said that the doctrine will not apply until 1993, see 12 U.S.C. §2277 a-10(d) and (f), courts should not apply the doctrine.

C. CONGRESS ADOPTED THE D'OENCH DOCTRINE FOR THE FARM CREDIT ADMINISTRATION, BUT IT DOES NOT APPLY UNTIL 1993.

In connection with the Farm Credit System, Congress has already adopted

D'Oench, but provided that it is not effective until January 6, 1993. Newly-enacted 12 U.S.C. §2277a-10(d) adopts D'Oench on behalf of the FCSIC and parallels the similar FDIC section. Referring to the FCSIC as the Corporation, §2277a-10(d) reads:

> Rights to Assets.
>
> Any agreement that shall diminish or defeat the right, title, or interest of the corporation in any asset acquired by such Corporation under this section, either as security for a loan or by purchase, shall not be valid against the corporation unless the agreement--
>
> (1) Is in writing;
>
> (2) Is executed by the bank and the person or persons claiming an adverse interest there under, including the obligor, contemporaneously with the acquisition of the asset by the bank;
>
> (3) Has been approved by the Board of Directors of the bank or its loan committee, which approval shall be reflected in the Minutes of the Board or Committee; and

(4) Has been, continuously, from the time of its execution, an official record of the bank.

Section 12 U.S.C. §2277a-10(f) provides, however, that "the Corporation shall not exercise any authority under this Section during the 5-year period beginning on the date of the enactment of this Part [enacted Jan. 6, 1988]." See 12 U.S.C. §2277a-10(f).

The reason for the five-year hiatus is simple. Not until 1993 will the FCSIC become fully operational and resemble the FDIC and FSLIC as an insurer. It is not coincidental that when the Corporation was created to insure the Farm Credit System, it is statutorily allowed to assert the D'Oench doctrine defense. As noted in 12 U.S.C. §2277a-5, the insurance will be issued based on documents submitted to the FCSIC by each insured system bank. The

FSLIC will rely on these documents to insure a system bank. Because of its reliance on the books of each system bank, the Corporation is given protection equivalent to that in D'Oench. See 12 U.S.C. §2277a-10(d). REW is not in this position. It never insured anything nor did it examine or rely on any records or documents of the failed Federal Land Bank of Jackson. Because Congress expressly decided in 12 U.S.C. §2277a-10(f) that §2277a-10(d) does not apply until 1993, and because REW is not a Receiver under 12 U.S.C. §2277a(5) appointed by the newly-created FCSIC under 12 U.S.C. §2277a-1, the notion that D'Oench applies to defeat Mrs. Grant's and the other borrowers' claims and defenses fails.

CONCLUSION

The judgment of the Second Circuit, reversing the district judge, was incorrect and should be reversed. The D'Oench doctrine does not apply to the REW to deprive Mrs. Grant and the co-borrowers of their claims and defenses. Congress has seen fit to adopt legislatively the D'Oench doctrine to the Farm Credit System, but only after 1993, and only after the newly-reorganized farm credit system resembles the FDIC and FSLIC. REW wants the protection of the D'Oench doctrine while acknowledging that it never had the obligations akin to those of the FDIC and FSLIC, namely insuring depositors and

loaning money. Moreover, and ignored by the Second Circuit, even if applicable, "D'Oench, Duhme has not been read to mean that there can be no defenses at all to attempts . . . to collect on promissory notes." Federal Deposit Ins. Corp. v. McClanahan, 795 F.2d 512, 515 (5th Cir. 1986). For instance, where the note imposes bilateral obligations on the parties, courts have held that the maker may defend himself by contending that the bank breached its obligations under the note. See, e.g., Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981); Riverside Park Realty Co. v. FDIC, 465 F.Supp. 305 (M.D. Tenn. 1978).

For all of the above reasons, Mrs. Grant prays that her Writ be granted and the Louisiana Second Circuit Court of Appeal decision reversed and vacated.

Respectfully submitted,

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Attorneys for Suzanne Brunazzi Grant

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the above and foregoing have been served upon counsel of record by depositing same in the United States Mail, postage paid, this _____ day of August, 1990.

_____

KEVIN R. TULLY (#1627)

APPENDIX A

THIRD JUDICIAL DISTRICT COURT

PARISH OF UNION

STATE OF LOUISIANA

NO. 27,489 DIV. DKT. NO.

T.A. GRANT, III, ET UX AND
JAMES C. STEELE, III

VERSUS

FEDERAL LAND BANK, FEDERAL LAND BANK OF NEW ORLEANS, FEDERAL LAND BANK OF JACKSON, FEDERAL LAND BANK ASSOCIATION OF MONROE, LOUISIANA, WILLIAM CRAWFORD, BURNS WRIGHT, WALLACE IVY AND D. REX PARKER

FILED:_____ _____
DEPUTY CLERK

O R D E R

Considering the Motion for Summary Judgment filed by defendant, REW Enterprises, Inc. as Receiver for the Federal Land Bank of Jackson in the above entitled and numbered cause, and the memoranda and affidavit in opposition

thereto filed by plaintiffs, Thomas A. Grant, III, Suzanne Brunazzi Grant, and James C. Steele, III, and for the reasons set forth in the opinion rendered August 7, 1989;

It is hereby ORDERED that said motion be and hereby is DENIED.

Farmerville, Louisiana, this 2nd day of October, 1989.

/s/
E. Joseph Bleich, Judge

APPENDIX A (continued)

T.A. GRANT, III
ET UX AND
JAMES C. STEELE,
III

VERSUS NO. 27,489

FEDERAL LAND BANK,
FEDERAL LAND BANK OF
NEW ORLEANS, FEDERAL
LAND BANK OF JACKSON,
AND FEDERAL LAND BANK
ASSOCIATION OF
MONROE, LOUISIANA

THIRD JUDICIAL
DISTRICT COURT

PARISH OF UNION

STATE OF
LOUISIANA

FILED:_____ DY CLERK_____

OPINION

This matter is before the court on the motion for summary judgement filed by REW, the receiver for defendant Federal Land Bank of Jackson (FLBJ).

Plaintiffs originally filed this "lender liability" suit in Union Parish. They alleged that defendants had, by actions involving violations of alleged oral agreements and understandings, caused

plaintiffs' default on a $15 million dollar loan and sought penalties, attorney fees, and a permanent injunction preventing defendants from foreclosing on the loan and from violating the terms and agreements of the loan. Defendant FLBJ counterclaimed, seeking judgment on the notes and recognizing the mortgages and pledges. Defendant REW later filed the instant motion for summary judgment, seeking dismissal of plaintiffs' claims and judgment recognizing its rights under the notes and mortgages and permitting foreclosure to commence. REW argues in essence that the Federal common law D'Oench doctrine applies in this case to bar any defenses to the loans that did not appear in the records of FLBJ, and that plaintiffs' allegations of violations of oral agreements and understandings were thus irrelevant and that it was entitled

to summary judgment as a matter of law. Plaintiffs, of course, disagree vehemently that the D'Oench doctrine is applicable to protect REW, and urge that genuine issues of material fact remain regarding the knowledge of FLBJ of the alleged oral agreements and understandings and the FLBJ's good faith or lack thereof.

Summary Judgment---Applicable Legal Principles

The sole purpose for the motion for summary judgment is to determine in advance of trial whether a genuine issue of material fact exists between the litigants. Indus. Sand and Abrasives v. L. & N. R. Co., 427 So.2d 1152 (La. 1983). It is designed to dispose of frivolous demands and is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La.C.C.P. Art. 966.[1]

[1]Art. 966. Motion for summary judgment; procedure

A. The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

B. The motion for summary judgment shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.

C. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Cases which require a judicial determination of subjective facts, e.g., knowledge, motive, intent, good faith, are not appropriate for summary judgment. New South Advertising v. Krock-O-Cheese, Inc., 486 So.2d 1115 (La. App. 2d Cir. 1986); Watson v. Cook, 427 So.2d 1312 (La. App. 2d Cir. 1983). Nor is summary judgment appropriate as a vehicle for the disposition of a case, the ultimate decision in which will be based on opinion evidence. Verrett v. Cameron Telephone Co., 417 So.2d 1319 (La. App. 3d Cir. 1982), writ denied 422 So.2d 164 (La. 1982).

The party who moves for summary judgment has the burden of clearly showing that there is not a genuine issue of material fact in dispute. In determining if the

mover has satisfied his burden, the court will closely scrutinize the pleadings, affidavits and documents of the mover and will resolve any reasonable doubt as to the existence of a genuine issue of material fact against the mover and in favor of trial on the merits. Indus. Sand & Abrasives v. L. & N. R. Co., supra. If the supporting documents presented by the moving party are insufficient to resolve all material fact issues, summary judgment must be denied. If sufficient, the burden shifts to the opposing party to present evidence showing that the material facts are still at issue. LSA-C.C.P. Art. 967[2];

[2]Art. 967. Same; affidavits

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts

(Footnote 2 continued)
thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him.

If it appears from the affidavit of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this article are presented in bad faith or solely for the purposes of delay, the court immediately shall order the party employing them to pay to the other party the amount of the reasonable expenses which the filing

Sanders v. Hercules Sheet Metal, Inc., 385 So.2d 772 (La. 1980). The opposing party need not file affidavits unless the moving party has established both that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Dement v. Red River Valley Bank, 506 So.2d 1329 (La. App. 2d Cir. 1987).

DISMISSAL OF PLAINTIFFS' CLAIMS

It seems to the court that the reliance placed by both parties on the D'Oench doctrine is misplaced as regards plaintiffs' claims. While the doctrine might apply to prevent plaintiff's from using the alleged oral agreements and understandings as a defense to the

(Footnote 2 continued)
of the affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be adjudged guilty of contempt.

collection of the loans, it would not apply to defeat plaintiffs' state law claims for lender liability. As for plaintiffs' lender liability claims, then, genuine issue of material fact remain concerning FLBJ's knowledge and/or acquiescence or actions in the alleged oral understandings and agreements, and concerning FLBJ's good faith or lack thereof in transactions with plaintiffs. Accordingly, REW's motion for summary judgment is DENIED as to plaintiffs' demands.

RECOGNITION OF NOTES, MORTGAGES, PLEDGES AND COMMENCEMENT OF FORECLOSURE

If REW were correct in its assertion that the D'Oench doctrine applies in this case, the case for all practical purposes would be over as far as REW's conventional demand is concerned. However, the Court is not persuaded that it should be governed

by this Federal common law doctrine. Plaintiffs in their petition alleged various state law defenses to foreclosure on the notes and mortgages, all of which basically boil down to the theory that REW is estopped to foreclose, since the actions of the FLBJ directly caused plaintiffs' default.[3] It is not clear as a matter of law that this Federal common law doctrine would apply to bar these state law defenses to the foreclosure in this state court action.[4]

[3]REW has not claimed holder in due course status (see REW's Supplemental Reply Memorandum of Law in Support of Summary Judgment, page 8).

[4]See also Judge Don Walter's opinion wherein he remanded this case back to the instant court. Judge Walter's ruling is certainly not controlling because, among other things, he was considering the issue of Federal jurisdiction. However, the following statements wherein Judge Walter pointed out various fallacies in REW's argument that it is in the same position

(Footnote 4 continued)
as the FDIC, the FSLIC and the future FCSIC are interesting:

> REW attempts to like its position to the Federal Deposit Insurance ("FDIC") or to the Federal Savings and Loan Insurance Corporation ("FSLIC"). However, REW is not the to-be created Federal Credit System Insurance Corporation ("FCSIC") which, as REW notes, does not become operational until January 6, 1993. Moreover, the regulatory scheme Congress has created for the new FCSIC is not identical to the schemes for the FDIC or for the FSLIC. REW has not pointed out where Congress has created for the FCSIC the administrative remedies that parties having claims against the FSLIC or FDIC must first exhaust.

In addition to Judge Walter's comments, it is also interesting to note that Congress has created the Farm Credit System Insurance Corporation to handle the same function that REW is now handling. See 12 USCA Sec. 2277(a)(1). In conjunction with the creation of this FCSIC, Congress also codified the D'Oench doctrine and made it applicable, (12 USCA Sec. 2211(a)-10(d)) but deferred effectiveness until the year 1993. 12 USCA Sec. 2277-10(f). Thus, it is somewhat inconsistent for REW to urge that it should clearly have the benefit of the D'Oench doctrine now.

Without the D'Oench doctrine, genuine issues of material fact remain concerning the FLBJ's knowledge and/or acquiescence or actions in the alleged oral understandings and agreements, and concerning FLBJ's good faith or lack thereof in transactions with plaintiffs.[5] Evidence concerning such oral arguments would in all probability be admissible as between the parties under Louisiana's patrol evidence rule, not to vary or alter the notes, but to show the entire contract. Scafidi v. Johnson, 420 So.2d 1113, 1115 (La. 1982). Accordingly, REW's motion for summary judgment recognizing the notes and mortgages and allowing them to commence

[5]This is not to say that there are no other issues; however, the existence of a single genuine issue of material fact renders summary judgment inappropriate.

foreclosure is hereby DENIED.

Formal judgment will be presented in accordance with this opinion, approved as to form by counsel.

THUS DONE AND SIGNED this 7th day of August, 1989, Farmerville, Union Parish, Louisiana.

/s/
JUDGE E. JOSEPH BLEICH

APPENDIX B

NO. 21,648-CW

COURT OF APPEAL
SECOND DISTRICT
STATE OF LOUISIANA

* * * * *

T. A. GRANT, III,
ET AL Plaintiffs/Respondents

versus

FEDERAL LAND BANK
OF JACKSON, ET AL Defendants/Applicants

* * * * *

On Application for Writs from the
Third Judicial District Court for the
Parish of Union, Louisiana
Trial Court No. 27,489

Honorable E. J. Bleich, Judge

* * * * *

THEUS, GRISHAM,
DAVIS & LEIGH
By: J. Michael Hart

Attorney for T.A.
Grant, III

CHRISTOVICH AND
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Suzanne Brunazzi
Grant

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By: L. Michael Ashbrook
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Attorneys for James C. Steele, III

MILLING, BENSON, WOODWARD, HILLYER, PIERSON & MILLER
By: James K. Irvin
Jean M. Sweeney
Edward J. Pointer

Attorneys for Defendants/ Applicants

* * * * *

Before: HALL, SEXTON and HIGHTOWER; JJ.

HALL, Chief Judge

Applicant filed a motion for summary judgment alleging that as a matter of law respondents could not assert their claims against it, and that it was entitled to judgment on its reconventional demand, which sought to enforce the respondent's obligation on promissory notes by foreclosure on mortgages. The district court denied the motion and applicant applied to this court for a supervisory writ, which

was granted. We now reverse the trial court's denial of the motion and remand to the district court to enter judgment in favor of applicant.

FACTS AND PROCEDURAL HISTORY

Respondents, T. A. Grant, III, Suzanne Brunazzi Grant and James C. Steele, III (hereinafter sometimes referred to as "The Grants" or "Grants"), filed a "lender liability suit against the Federal Land Bank of Jackson (FLBJ), three of the land bank's officers, the Federal Land Bank Association of Monroe (FLBA) and its president, asserting that the FLBJ had breached an agreement which would have allowed the respondents to sell certain mortgaged property and apply the proceeds to the debt. They sought an injunction preventing the foreclosure on the mortgaged property and further breaches of the

agreement, damages, and an order compelling the FLBJ to release certain collateral such that it could be sold and the proceeds applied to respondents' loan debt. The FLBJ answered and filed a reconventional demand seeking to collect on promissory notes issued to the bank by respondents and foreclosure on mortgages securing the notes. Subsequently, the FLBJ was placed in receivership by the Farm Credit Administration (FCA) and REW Enterprises, Inc. (REW), applicant, was appointed as receiver. REW was substituted for the FLBJ as a party to the litigation.

Initially, respondents borrowed $15,000,000 from the FLBJ to help fund the purchase of 36,000 acres of immovable property. The loan is evidenced by a promissory note dated July 12, 1983 and is secured by a mortgage on approximately

16,000 acres of the immovable property and a pledge of 150,000 shares of FLBA stock.

Another loan[1] of $1,500,000 was made to the respondents which is evidenced by a promissory note dated July 30, 1985. This note is secured by the pledge of additional shares of FLBA stock and a collateral mortgage package on additional immovable property.

Respondents, unable to make payment on the January 1986 loan installments, were sent a notice threatening foreclosure on the mortgages if installments were not timely paid. The Grants and Steele

[1]Respondents were unable to meet their payment on an installment due on January 1, 1985. They borrowed money from Ouachita National Bank to pay the indebtedness and a letter of credit was given by the FLBJ to Ouachita, which was contrary to policy. The letter of credit was paid and the respondents were loaned the additional 1.5 million, pursuant to this transaction.

responded to the notice by initiating the instant action, which REW seeks to have dismissed by summary judgment.

REW'S MOTION FOR SUMMARY JUDGMENT

REW contends that the claims asserted by the respondents cannot be maintained against it as a matter of law. It relies on the United States Supreme Court case of D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed 956 (1942), and its progeny in support of its motion. The district court ruled that REW was not sufficiently similar to the FDIC or FSLIC to take advantage of the doctrine espoused in D'Oench, and since genuine issues of material fact remained the motion for summary judgment was denied. It is that ruling which is at issue in this supervisory writ.

D'OENCH AND IT'S PROGENY

In D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, supra, the maker of a facially valid promissory note attempted to defend a suit by the FDIC for collection on the note with the defense of failure of consideration. The maker alleged that the note was given with the understanding that it would not be collected. The Supreme Court found that there was a public policy protecting the FDIC, as the regulator and insurer of national financial institutions, from "secret agreements," because to allow the assertion of "secret agreements," i.e. agreements executed outside the face of the banking institutions records and assets, against the FDIC would thwart the FDIC's function in overseeing and regulating the financial institutions. Therefore, since

the maker had "participated in" a scheme which deceived the regulatory authority in that he gave a note facially invalid but which in fact had a false status, he was estopped from asserting his defense against the FDIC. Thus, the FDIC was protected in relying on the records and documentation of the financial institution which in D'Oench indicated that the promissory note was an asset of the bank.

Since D'Oench, Congress has codified the policies enunciated in that case at 12 U.S.C. §1823(e). Although the holding of D'Oench applies to the FDIC when acting in its corporate capacity, later jurisprudence has applied the statutory authority in protecting the FDIC in its corporate capacity and the common law rule of D'Oench

in protecting the FDIC in its capacity as receiver.[2] Beighley v. Federal Deposit Insurance Corporation, 868 F.2d 776 (5th Cir. 1989); Federal Deposition Insurance Corporation v. McClanahan, 795 F.2d 512 (5th Cir. 1986).

D'Oench has been revisited on numerous occasions since its inception in 1942. Over the years it has enjoyed expanded application both in terms of which institutions enjoy its protection and in terms of what it protects against.

The Federal Savings & Loan Insurance Corporation was extended D'Oench protection

[2]The FDIC has dual roles. When acting in its corporate capacity it acts primarily as the insurer of deposits. When acting as a receiver its primary function is to marshall the asserts of failed lending institutions in protection of the institution's unsecured creditors and shareholders.

in the case of Taylor Trust v. Security Trust Federal Savings and Loan Association, 844 F.2d 337 (6th Cir. 1988). The United States Fifth Circuit adopted the ruling of Taylor Trust, supra, in Federal Savings and Loan Insurance Corporation v. Murray, 853 F.2d 1251 (5th Cir. 1988), finding that D'Oench protected against arrangements likely to deceive a federal regulatory authority. Because the FSLIC was sufficiently similar in function to the FDIC, the court held that it was entitled to D'Oench protection.

Not only have the FDIC and FSLIC enjoyed the protection of D'Oench, but in Bryan v. Bartlett, 435 F.2d 28 (8th Cir. 1970), the receiver appointed by the Securities Exchange Commission of an insolvent financial services corporation was extended protection by way of analogy.

In that case, officers of the failed institution had given promissory notes to the institution. They were estopped from denying the validity of those notes in that suit. The court stated, "the receiver, while not a federal corporation, is an officer of a federal court appointed because of violations of federal law. The policy underlying the federal Securities Act of 1933 is to protect investors from the fraudulent sale of securities and the common loss of investment which follows from violation of the act. In unsnarling the tangled affairs of these corporations to preserve insofar as possible assets for distribution to the defrauded investors, the receiver is performing a federal function." Thus, the court applied federal law and went on to hold that D'Oench applied by analogy since deception was

carried out on a regulatory official.

Substantively, D'Oench has evolved such that the test of application is whether the borrower lent himself to a scheme or arrangement likely to mislead banking authorities. Beighley, supra at p. 784. In essence, a debtor will be estopped from asserting in a suit on a note any separate agreement between the lender and borrower which contradicts the written terms of the loan documentation. The D'Oench doctrine prevents defenses such as lack of consideration, fraud by bank officials, agreements made in good faith by borrowers, and assertions that course of dealing has altered the loan agreement. See, D'Oench, supra; Beighley, supra; Mainland Savings Association v. Riverfront Associates, Ltd., 872 F.2d 955 (10th Cir. 1989); Murray, supra; Federal Savings &

Loan Insurance Corporation v. Lafayette Investment Properties, 855 F.2d 196 (5th Cir. 1988); McClanahan, supra; Federal Deposit Insurance Corporation v. Hatmaker, 756 F.2d 34 (6th Cir. 1985).

In Murray, supra, the borrowers were loaned 3.6 million dollars by Alliance Federal Savings & Loan Association to finance the purchase of real estate for commercial development. The borrowers formed a partnership but signed the promissory note in their individual capacities. Alliance was taken over by the FSLIC who sued the individuals on the promissory note. The borrowers defended the suit in several grounds including that Alliance had violated side oral agreements and that Alliance had fraudulently altered the notes. The borrowers contended that Alliance had misrepresented that it would

fund additional loans or extend the term of the interest reserve and that it would release certain borrowers from liability once they sold their share of the partnership. The court barred the defenses, stating that the assertion oral side agreements had been invalidated almost 50 years ago in D'Oench. The court also barred the borrowers' defense based on the association's fraudulent alteration of the note.

In Lafayette Investment Properties, supra, defendant endorsed and guaranteed a note made payable to Sunbelt Bank by Lafayette Investment Properties. Defendant asserted that officials at Sun Belt assured him that his liability on the note would terminate when certain loan documents were completed and delivered to the bank. No written statement evidencing such an agreement was ever made and D'Oench barred

the defense.

The United States Tenth Circuit has barred claims of intentional fraud, gross negligence, reckless conduct, breach of an agreement to fund, and breach of an implied covenant of fair dealing, which were asserted by borrowers against the FSLIC acting as receiver for Mainland Savings Association. Mainland Savings Association v. Riverfront Associates, Ltd., supra. The borrower's primary contention in that case was that Mainland reneged on a promise to fund a second loan sufficient to pay the first. The court relied on D'Oench to protect the FSLIC from "undisclosed agreements." Further, Riverfront alleged that its agreement was memorialized in the loan documentation of Mainland. The court looked at the note, accompanying security agreement and other documents pertaining

to the transaction and determined that nothing in those documents evidenced any type of conditional promise or side agreement.

REW, BENEFACTOR OF D'OENCH

The primary issue in this appeal is whether REW is entitled to D'Oench protection. The district court found that REW was not sufficiently similar to the FDIC or FSLIC to warrant the application of D'Oench in this case.

The Farm Credit Administration appointed REW as receiver of this failed national land bank. The FCA is an independent agency in the executive branch of the federal government. 12 U.S.C. §2241. The Farm Credit Administration Board (FCAB) administers and establishes policies of the FCA. 12 U.S.C. §2243. The chairman of the FCA Board is the chief executive officer

of the FCA. 12 U.S.C. §2244. The powers of the FCA, enunciated at 12 U.S.C. §2252, enable the administration to supervise the stability and condition of institutions in the Farm Credit System, which included this failed institution. The FCA makes reports to Congress on the condition of those institutions and determines the rules and regulations which govern those institutions. In fact, the powers of examiners of Farm Credit System institutions are co-extensive with the powers given FDIC and FSLIC examiners. 12 U.S.C. §2254. In overseeing the institutions in the Farm Credit System, the FCA functions similarly to the FDIC and FSLIC as overseers of the banking and thrift institutions. See and compare, 12 U.S.C. §1819; 12 U.S.C. §1820, 12 U.S.C. §1821; 12 U.S.C. §1725(c), 12 U.S.C. §1729; 12 U.S.C. §2252; 12 U.S.C.

§2254; 12 U.S.C. §2255; 12 U.S.C. §2256; 12 U.S.C. §2257 and 12 U.S.C. §2243. Although there is currently no insurance corporation in place to protect against the failure of a land bank, Congress has devised such a scheme to become operational in 1993. See 12 U.S.C. 2277a-1 et seq.[3]

Even though the FCA does not insure the land banks it regulates, it examines the banks and supervises their financial condition. Through these examinations, the FCA seeks to protect the investors, creditors and debtors of the land bank by insuring that the bank is sound. In this case, the land bank was determined to be

[3]Although the FCSIC will enjoy statutory D'Oench protection in 1993, the resolution of this case is not contingent on that regulation. We examine only whether D'Oench in its common law form is applicable to REW.

insolvent and REW was appointed receiver pursuant to 12 U.S.C. §2183. The FCA's appointment of a receiver only in that the FDIC and FSLIC must appoint themselves as receiver in the case of failed national banks or thrifts. 12 U.S.C. §1821(c)(2)(A)(ii), 12 U.S.C. §1729(b)(1). However, the FCA has provided for the powers and duties of receivers of failed Farm Credit System institutions. 12 C.F.R. 611.1161 and 12 C.F.R. 611.1171.

REW contends that it functions similarly to the FDIC and FSLIC as receivers, when it functions as the receiver of a failed federal land bank. A comparison of appropriate statutes and regulations compels us to agree. See and compare 12 C.F.R. 611.1161 and 12 C.F.R. 611.1171 with 12 U.S.C. §1464(d)(5)(D); 12 U.S.C. §1729(c)(3)(B); 12 U.S.C. §1729(b)(1), 12

U.S.C. §1821(d)(2)(E), and 12 U.S.C. §1821(c)(2)(B).

The function of the FDIC, when acting as receiver for a failed bank, has been explained as "marshalling the assets of the failed bank for the benefit of the bank's creditors and shareholders." A failure of the receiver to recover on an asset of the failed institution results in a loss for the institution's unsecured creditors and stockholders. McClanahan, supra; FDIC v. Hatmaker, supra. REW, like the FDIC and FSLIC, is charged with the responsibility of marshalling the failed land bank's assets, paying the liabilities and protecting, as well as it can, the creditors and stockholders of the failed institution. Since REW is essentially functioning as the FDIC or FSLIC would function as receivers, the failed land bank

is a federal banking institution regulated by a federal authority, and that authority appointed REW as receiver, we think that policy dictates that REW receive the protection afforded by application of the D'Oench doctrine.

Though a federal district court ruled that REW was not sufficiently like the FDIC or FSLIC for purposes of removal of this case from state to federal court, we do not find that opinion controlling of our decision today. Whether REW could remove this case to federal court is wholly inapplicable to the issue before us.

RESPONDENTS' AGREEMENT

Respondents assert that even if REW is benefited by the D'Oench doctrine, the facts of this case do not warrant application of D'Oench. Specifically, respondents contend that their agreement is set forth

in writing in the loan documentation of the failed bank and thus, the agreement is not "secret." REW strongly contests this assertion.

In the plaintiffs' petition they alleged that through discussions and correspondence with officers of the FLBJ and FLBA, an agreement was reached such that the FLBJ agreed to release collateral from the mortgage so that it could be sold and the proceeds applied to the debt. They also allege that in fact the FLBJ had released property, the property was sold, and the proceeds were applied to the debt. Respondents contend that they were led into a "false sense of security" that they would be allowed to continue to service the debt in this manner, but that the FLBJ had changed its policy without warning, which led to their default on the loan. This

change in policy with regard to releasing collateral is asserted to be a breach of the parties' agreement. Thus, respondents sought to enjoin the FLBJ from foreclosure and sought to force the release of collateral so that it could be sold and the proceeds applied to the debt.

REW asserts that the "agreement" upon which respondents rely is an oral side agreement. REW filed an affidavit with its motion for summary judgment which stated that there was no written agreement altering the terms of the loan documentation. Respondents assert that documents in the loan file evidence the agreement.

The loan documentation itself prohibits the respondents from alienating or further encumbering the mortgaged property without the consent of the FLBJ. The notes evidence an unequivocal promise

by respondents to repay the loan. Nothing in those documents requires the FLBJ to release the collateral from the mortgage.

Respondents point this court to several documents as evidence of the agreement upon which their cause of action is based. These documents include: a document evidencing the advance payment fund policy; various memos to the file evidencing association officers' recommendation to release collateral; actual releases of collateral approved by the FLBJ; and other memos showing the bank officials knowledge of proposals to release collateral. Essentially, the respondents allege that the documents in the record show that the land bank had knowledge of releases and the course of dealing allowed releases. This type of arrangement is exactly what D'Oench and its progeny sought

to prevent. None of the recorded information requires the FLBJ to forever release collateral upon request of the borrower. The FLBJ was free to release collateral based on its business judgment, but was not required by agreement to do so.

Even though the respondents were allowed to sell mortgaged property in the past and even though from time to time requests to release collateral were made with the approval or recommendation of association officials, the land bank had to approve the releases. The land bank always prefaced the prior releases with the phrase "Except as herein provided, said mortgage shall remain in Full Force and Effect."

There is no doubt that the parties were able to reach agreements in the past with regard to releasing the collateral.

But, the parties never reached an agreement which forever bound the FLBJ to release its collateral. If such an agreement was reached, it cannot now be asserted against the receiver of the failed institution because it was not in writing and evidenced by the loan documents.

In Langley v. Federal Deposit Insurance Corporation, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987), at issue was the meaning of the word "agreement" in 12 U.S.C. §1823(e), the codification of D'Oench. The Supreme Court found that a purpose of 1823(e) is to allow banking regulatory officials to quickly make decisions regarding the fiscal soundness of banking institutions. That purpose would be inhibited if "bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions."

The court held that the borrowers' claims and defenses based on an assertion that the failed bank had wrongfully procured the notes through misrepresentations regarding the amount of land borrowers were purchasing and mineral interests in the land, were agreements barred by 1823(e).

Though 1823(e) by its terms applies to the FDIC, both 1823(e) and Langley have been applied by analogy in protecting the FSLIC. Riverfront, supra; Murray, supra. D'Oench provides the foundation for protecting against undisclosed agreements and Langley offers the parameters of the word "agreement"; both of which we apply by analogy to protect REW.

In Beighley v. Federal Deposit Insurance Corporation, supra, the defendant, Beighley, assumed the indebtedness of his closely held corporation, El Rancho Pinoso,

Inc. The note he assumed was for $932,000 and was secured by mortgages on immovable property in Tucumcari, New Mexico and Gaines County, Texas. The assumption was part of a plan to reduce Beighley's total indebtedness. As part of that plan it was contemplated by the bank, Moncor Bank, N.A., and Beighley that the Tucumcari and Gaines County property would be sold and the proceeds applied to reduce Beighley's debt. Beighley contended that the bank also agreed to finance the third party purchase of the Tucumcari and Gaines County properties and that they breached that agreement. Therefore, he attempted to prevent the foreclosure on the property by the FDIC.

Even though there was evidence in the record which showed that the bank intended to finance the third party purchase, the

Fifth Circuit ruled that the agreement could not be asserted against the FDIC as receiver, relying on D'Oench. The court found that the documents in evidence could, when read together, infer an agreement. But, no single document stated that the bank agreed with Beighley to finance a creditworthy buyer for the properties. Beighley, at p. 783.

In Federal Savings & Loan Insurance Corp. v. Two Rivers Associates, 880 F.2d 1267 (11th Cir. 1989), a party tried to prevent the FSLIC from foreclosure on mortgages securing promissory notes because the lending institution had purportedly breached an agreement with its borrowers. The FSLIC had acquired the notes and mortgages as receiver for the failed lending institution. The claimant attempted to circumvent D'Oench by arguing that the

breached agreement was not "secret." The asserted agreement would have bound the lending institution to fund an entire condominium construction project. Though there were documents in the record which evidenced the lending institution's intent to fund the entire project, the claimant could not show any document which obligated the lending institution to fund the entire construction project. Therefore, the agreement, even if made, was an oral "secret agreement" barred by D'Oench.

As in Beighley and Two Rivers, the documents on which respondents rely do not obligate the FLBJ to release the collateral from the mortgages. While the documents respondents point us to certainly suggest that releases of collateral were contemplated, no document or group of documents in the record evidences an obligation of

the land bank to forever release collateral such that it could be sold and the proceeds applied to the debt. Therefore, the agreement is a side agreement which cannot be asserted against REW as the receiver of a failed federal land bank. As in Langley and Beighley, supra, both the affirmative claims and defenses which rely on the side agreement are barred.

THE LOUISIANA UNFAIR TRADE PRACTICES ACT

In their petition, respondents allege that the FLBJ violated the Louisiana Unfair Trade Practices and Consumer Protection Law, LSA-R.S. 51:1401 et seq., by a breach of the agreement between the parties. They contend that the FLBJ's failure to release collateral for sale caused the respondents to fail to meet their loan obligations. Respondents allege that the FLBJ, by failing to negotiate with the respondents

concerning repayment of the loan installments, has unfairly caused the respondents to be unable to compete in the timber market.

Having already found that the agreement upon which respondents rely cannot be asserted against REW, we conclude that the assertion of the breach of that agreement through the Louisiana Unfair Trade Practices Law is also prevented by D'Oench and its progeny. Respondents cannot allege the agreement to support their breach of contract claim, and should not be allowed to subvert the policies enunciated in D'Oench by asserting the same cause of action as an unfair trade practice. Also, REW's foreclosure on a mortgage held by it does not constitute an unfair trade practice.

FORECLOSURE ON THE MORTGAGES

REW asks that we grant judgment on the notes held by it and recognize its mortgages. Respondents assert that REW is not entitled to summary judgment on its reconventional demand because to do so would deprive them of a remedy against the FLBJ, which is unable to respond to an adverse judgment. Also, they contend that REW is prevented from proceeding with foreclosure by statute, 12 U.S.C. §2202a(b)(3).

By this first argument, respondents essentially allege that they are entitled to cancel their contract because of the breach by the FLBJ. They assert that cancellation is a proper remedy since the FLBJ cannot respond in damages. Having already found that the agreement which they claim was breached cannot be asserted against REW, there is no merit to this argument.

Secondly, 12 U.S.C. §2202a(b)(3) provides that:

> "No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section."

The Grants and Steele assert that the FLBJ has not complied with this section and that REW is therefore prevented from foreclosure.

The Board policy of the Fifth District Farm Credit Banks requires that the borrower submit an application for restructuring. The borrower is given at least 45 days to submit the application after notice of entitlement to restructure. The borrower must provide the land bank with a proposed plan for restructuring with the application. The land bank does not have to

consider restructuring unless the borrower submits an application. Respondents have not shown nor does the record reveal that they complied with this section or that consideration of restructuring is pending. Although notice of availability of restructuring was sent to respondents, their application for and plan of restructuring is not in the record. There being no pending consideration of the loan for restructuring under the statute, the statute does not prevent REW's foreclosure in this case.

CONCLUSION

D'Oench and the numerous cases relying on D'Oench all lead us to the conclusion that the type of arrangement upon which the respondents base their claim cannot be asserted against the receiver of a failed federal banking institution. Summary

judgment is proper when there is no genuine issue of material fact and mover is entitled to summary judgment as a matter of law. LSA-C.C.P. Art. 966. In this case, REW is entitled to summary judgment as a matter of law.

Respondents' claims constitute oral side agreements which cannot be asserted either as a claim or defense against the receiver of a federal banking institution. The receiver is entitled to rely on the loan documentation in this case which does not bind the FLBJ to release collateral from mortgages so that it can be sold and the proceeds applied to the debt. D'Oench and its progeny prevent such an assertion. Because the agreement upon which respondents rely would alter the loan documentation relied on by REW, its assertion is barred. Also, since the agreement cannot

be asserted against REW, the breach of the agreement cannot be asserted as an unfair trade practice against REW.

For the reasons assigned, the judgment of the district court is reversed. The action is remanded to the district court for the entry of summary judgment rejecting plaintiffs' demands against REW and granting applicant's reconventional demand after any additional proceedings which may be necessary to determine the amount due including attorneys fees and costs to be assessed to plaintiffs.

REVERSED, AND REMANDED.

APPENDIX C

THE SUPREME COURT OF THE
STATE OF LOUISIANA

T. A. GRANT, III,
et al

NO. 90-CC-0934

VS.

FEDERAL LAND BANK OF
JACKSON, et al

- - - - -

IN RE: Grant, Suzanne Brunazzi; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 21648-CW; Parish of Union 3rd Judicial District Court Div. "B" Number 27,489

- - - - -

May 25, 1990

Denied.

LFC
PFC
WFM
JLD
JCW
MAS

Supreme Court of Louisiana
May 25, 1990

/s/_____
Clerk of Court
For the Court

APPENDIX C (continued)

THE SUPREME COURT OF THE
STATE OF LOUISIANA

T. A. GRANT, III,
et al

NO. 90-CC-0957

VS.

FEDERAL LAND BANK OF
JACKSON, et al

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IN RE: Steele, James C., III; - Plaintiff(s); Applying for Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs; to the Court of Appeal, Second Circuit, Number 21648-CW; Parish of Union 3rd Judicial District Court Div. "B" Number 27,489

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May 25, 1990

Denied.

LFC
PFC
WFM
JLD
JCW
MAS

Supreme Court of Louisiana
May 25, 1990

/s/_____
Clerk of Court
For the Court

APPENDIX D

STATUTES

12 U.S.C. §2001 (a) and (b) (1971) reads as follows:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free national and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.
>
> It is the objective of this Act to continue to encourage farmer- and rancher- borrowers participation in the management, control, and ownership of a permanent system of credit for agriculture which will be responsive to the credit needs of all types of agricultural producers having a basis for credit, and to modernize and improve the authorizations and means for furnishing such credit

and credit for housing in rural areas made available through the institutions constituting the Farm Credit System as herein provided.

12 U.S.C. §2183(b) reads as follows:

(b) The Farm Credit Administration Board may appoint a conservator or receiver for any System institution on the determination by the Farm Credit Administration Board that one or more of the following exists, or is occurring, with respect to the institution: (1) insolvency, in that the assets of the institution are less than its obligations to its creditors and others, including its members; (2) substantial dissipation of assets or earnings due to any violation of law, rules, or regulations, or to any unsafe or unsound practice; (3) an unsafe or unsound condition to transact business; (4) willful violation of a cease and desist order that has become final; (5) concealment of books, papers, records, or assets of the institution or refusal to submit books, papers, records, or other material relating to the affairs of the institution for inspection to any examiner or to any lawful agent of the Farm Credit Administration; (6) the institution is

unable to timely pay principal or interest on any insured obligation (as defined in section 5.51(3) [12 USCS §2277a(3)]) issued by the institution. The Farm Credit Administration Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If the Farm Credit Administration Board determines that a ground for the appointment of a conservator or receiver as herein provided exists, the Farm Credit Administration Board may appoint ex parte and without notice a conservator or receiver for the institution. In the event of such appointment, the institution, within thirty days thereafter, may bring an action in the United States district court for the judicial district in which the home office of such institution is located, or in the United States District Court for the District of Columbia, for an order requiring the Farm Credit Administration Board to remove such conservator or receiver, and the court shall, on the merits, dismiss such action or direct the Farm Credit Administration Board to remove such conservator or receiver, and such receiver and conservator, after the 5-year period beginning on the date of the enactment of the Agricultural Credit Act of 1987 [enacted Jan. 6, 1988], shall be the Farm

Credit System Insurance Corporation. On the commencement of such an action, the court having jurisdiction of any other action or enforcement proceeding authorized under this Act to which the institution is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

12 U.S.C. §2277a(5) reads as follows:

(5) Receiver. The term "receiver" means a receiver or conservator appointed by the Farm Credit Administration for a System institution.

12 U.S.C. §2277a-1 reads as follows:

There is hereby established the Farm Credit System Insurance Corporation which shall insure, in accordance with this part, the timely payment of principal and interest on notes, bonds, debentures, and other obligations issued under subsection (c) or (d) of section 4.2 on behalf of one or more System banks all of which are entitled to the benefits of insurance under this part.

12 U.S.C. §2277a-5 reads as follows:

Certification of Premiums

(a) Filing certified statement. Annually, on a date to be determined in the sole discretion of the Board of Directors, each insured System bank that became insured before the beginning of the year shall file with the Corporation a certified statement showing the annual average principal outstanding on loans made by the bank that are in accrual status, the annual average principal outstanding on loans that are in nonaccrual status, and the amount of the premium due the Corporation from the bank for such year.

(b) Contents and form of statement. The certified statement required to be filed with the Corporation under subsection (a) shall be in such form and set forth such supporting information as the Board of Directors shall prescribe, and shall be certified by the president of the bank or any other officer designated by its board of directors that to the best of the person's knowledge and belief the statement is true, correct, complete, and has been prepared in accordance with

this part [12USCS §§2277a et seq.] and all regulations issued thereunder.

(c) Initial premium payment. Each System bank shall pay to the Corporation the amount of the initial premium it is required to certify under subsection (a) as soon as practicable after January 1, 1990, based on the application of section 5.55 [12 USCS §2277a-4] to the accruing volume of the bank for calendar year 1989.

(d) Subsequent premium payments. The premium payments required from insured System banks under subsection (a) shall be made not less frequently than annually in such manner and at such time or times as the Board of Directors shall prescribe, except that the amount of the premium shall be established not later than 60 days after filing the certified statement setting forth the amount of the premium.

(e) Regulations. The Board of Directors shall prescribe all rules and regulations necessary for the enforcement of this section. The Board of Directors may limit the retroactive effect, if any, of any of its rules or regulations.

§2277a-10(d) reads as follows:

Rights to Assets.

Any agreement that shall diminish or defeat the right, title, or interest of the corporation in any asset acquired by such Corporation under this section, either as security for a loan or by purchase, shall not be valid against the corporation unless the agreement--

(1) Is in writing;

(2) Is executed by the bank and the person or persons claiming an adverse interest there under, including the obligor, contemporaneously with the acquisition of the asset by the bank;

(3) Has been approved by the Board of Directors of the bank or its loan committee, which approval shall be reflected in the Minutes of the Board or Committee; and

(4) Has been, continuously, from the time of its execution, an official record of the bank.

12 U.S.C. §2277a-10(f) reads as follows:

> . . . the Corporation shall not exercise any authority under this Section during the 5-year period beginning on the date of the enactment of this Part [enacted Jan. 6, 1988].